PETITION FOR WRIT OF CERTIORARI

123

Supreme Court, U.S.
FILED

(1)

081157 MAR 13 2009

OFFICE OF THE CLERK

No. 08-

IN THE

Supreme Court of the United States

WILLIAM B. ROOZ,

Petitioner,

v.

ROBERTA KIMMEL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MAXWELL KEITH
133 Commonwealth Avenue
San Francisco, CA 94118
(415) 387 1531

Attorney for Petitioner

22150:

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Can the bankruptcy court dismiss with prejudice a removed state fraudulent transfer complaint raising a post petition marital transfer agreement and authorize issuance of an injunction under the provisions of Bankruptcy Code, 11 U.S.C. § 524(a)(3) when the transferor, the other spouse in a community property state, has filed a no asset petition and the Trustee has abandoned claims upon these transfers?

2. Are the injunctive provisions of Bankruptcy Code, 11 U.S.C. § 524(a)(3) applicable when the creditor alleges an intentional scheme to prevent collection of his judgment by the third party-transferee defendant who holds assets which would be available to the creditor, the transfers would result in the ability to file a petition in bankruptcy which denies holding assets of a community and the Trustee has abandoned claims upon these properties?

3. Has the bankruptcy court erroneously failed to exercise its powers under 11 U.S.C. § 105 in granting relief to a debtor who has entered into a post petition marital transfer agreement in alleged violation of a state fraudulent transfer act while a judgment is pending?

LIST OF PARTIES

This is a petition by William B. Rooz, upon consolidated cases, which asserts relief against Mrs. Roberta Kimmel and her husband, David Kimmel.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Appendices	v
Table of Cited Authorities	vi
Citations to Opinions	1
Statement Of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Petition	6
I. Whether federalism requires bankruptcy courts to grant creditor rights under a State Uniform Fraudulent Transfer Act after a determination to exercise jurisdiction is a significant issue to be decided by the Court.	6

Contents

Page

A. Post petition fraudulent transfers raise unenforceability of injunctive relief under established equitable doctrines incorporated in Code § 105. 6

B. The entry into a post bankruptcy marital agreement is a jurisdictional event which terminates the reach of the Code's injunctive relief and prevents a dismissal with prejudice of an action based on State law. 7

C. The failure to protect the creditor from fraudulent transfers places the Ninth Circuit in conflict with the Seventh and Sixth Circuits. 11

D. Anti-waiver provisions do not protect voluntary transmutations. 12

E. The liability of a transferee holding property of a debtor is not based on personal liability but upon holding property of another to defeat judgments. 12

Conclusion 14

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed November 25, 2008 ..... 1a

Appendix B — Opinion Of The United States Bankruptcy Appellate Panel Of The Ninth Circuit Filed November 8, 2007 ..... 3a

Appendix C — Memorandum Decision Regarding Creditor's Post-Discharge Attempts To Collect Judgment Of The United States Bankruptcy Court For The Northern District Of California Filed April 11, 2007 ... 23a

Appendix D — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Filed December 19, 2008 ..... 44a

Appendix E — Statutes Involved 46a

Appendix F — Complaint Upon Transfers With Intent To Defraud Creditors Or Making A Transfer Without Fair Consideration Filed October 4, 2006 ..... 59a

TABLE OF CITED AUTHORITIES

Page

Cases:

Archer v. Warner, 538 U.S. 314, 123 S. Ct. 1462 (2003) 7

Brenelli Amedeo v. Bakara Furniture Co., 29 Cal. App. 4th 1828 (1994) 9, 12

Brown v. Felsen, 442 U.S. 127, 99 S. Ct. 2205 (1979) 7

City of Chicago v. International College of Surgeons, 552 U.S. 156, 118 S. Ct. 523 (1997) 7

Connell v. Walker, 291 U.S. 1, 54 S. Ct. 257 (1934) 6, 7, 9, 13

Craft v. United States, 65 F. Supp. 2d 651 (W.D. Mich., 1999) 13

Dixon v. Bennett, 72 Md. App. 620, 531 A.2d 1318 (1987) 13

FDIC v. Davis, 733 F.2d 1083 (4th Cir. 1984) 12

Fietz v. Great Western Savings, 852 F.2d 455 (9th Cir. 1988) 7

Filip v. Bucurenciu, 129 Cal. App. 4th 825 (2005) 9

Cited Authorities

Page

Innk L. & C. Co. v. Kenkel, 493 N.W.2d 818 (Iowa 1992) 12

In re Blatstein, 718 Arch St., Assoc., Ltd v. Blatstein, 192 F.3d 88 (3d Cir., 1999) 13

Kathy B. Enterprises, Inc. v. United States, 779 F.2d 1413 (9th Cir., 1986) 13

Marrama v. Citizens Bank of Massachusetts, __ U.S. __, 127 S. Ct. 1105 (2007) 6, 12

McClellan v. Cantrell, 217 F.3d 890 (7th Cir. 2000) 5, 11

Mejia v. Reed, 31 Cal 4th 657 (2003) 8, 9

Mellon Bank v. Vitanovich, 259 B.R. 873 (Bankr. 6th 2001) 11

Omni Development Corp. v. Atlas Assur., 956 P.2d 665, at 670 (Colo. App. 1998) 12

Sanwa Bank v. Chang, 87 Cal. App. 4th 1214 (2001) 7, 9, 12, 13

Schwaber v. Reed, 940 F.2d 1317 (9th Cir. 1991) ... 12

Cited Authorities

Page

Stoner v. Walsh, 24 Cal. App. 3d 938 (1972) 9

Wolkowitz v. Beverly, 374 B.R. 221, *rev'd in part, dismissed in part*, __B.R. __, 2008 DJDAR 18795 (Bankr. 9th 2007) 9, 10, 13

Statutes:

11 U.S.C. § 105 ..... i, 6

11 U.S.C. § 523(a)(2)(A) 1

11 U.S.C. § 524(a) 4

11 U.S.C. § 524(a)(3) ..... i, 4, 5, 8

11 U.S.C. § 524(a), (b), (e) 1

11 U.S.C. § 541(a) 1, 7, 11

11 U.S.C. § 541(a)(2) 8

11 U.S.C. § 541(a)(2)(A) 8

11 U.S.C. § 727 ..... 1, 5

28 U.S.C. § 157 1,7

28 U.S.C. § 1334 1

28 U.S.C. § 1334(b) 7

Cited Authorities

	Page
28 U.S.C. § 1367	1, 7
Cal. Civ. § 1214 (West Supp.)	1, 3
Cal. Civ. 3439, *et seq.*	2
Cal. Civ. § 3439.04 (West Supp.)	1
Cal. Civ. § 3439.07 (West Supp.)	1
Cal. Civ. § 3439.08 (West Supp.)	1
Cal. Family § 1000 (West 1994)	1
Cal. Family § 1502 (West 1994)	1, 3
Rules:	
Fed. R. Civ. P. 12(c)	3
Fed Bank. Rule 9027(e)	
Treatises:	
9c, American Jurisprudence, 2d, *Transfers between spouses*, sec. 2270	9
5 Collier on Bankruptcy, *Fraudulent Transfers in Community Property States*, § 548.12	10

Cited Authorities

Page

Other:

Alan Pedlar, *Community Property and the Bankruptcy Reform Act of 1978*, 11 St. Mary's L.J. 349 8-9

CITATIONS TO OPINIONS

The opinions are reported at 378 B.R. 630, 2007 DJDAR 17265 and 367 B.R. 166.

STATEMENT OF JURISDICTION

The Ninth Circuit's Memorandum Decision in the Roberta Kimmel case was rendered on November 25, 2008 (Appendix A), Petition for Panel Rehearing was denied on December 19, 2008 (Appendix D).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 523(a)(2)(A)
11 U.S.C. § 524(a), (b), (e)
11 U.S.C. § 541(a)
11 U.S.C. § 727
28 U.S.C. § 157
28 U.S.C. § 1334
28 U.S.C. § 1367
Cal. Civ. § 1214 (West Supp.)
Cal. Civ. § 3439.04 (West Supp.)
Cal. Civ. § 3439.07 (West Supp.)
Cal. Civ. § 3439.08 (West Supp.)
Cal. Family § 1000 (West 1994)
Cal. Family § 1502 (West 1994)

(*See* Appendix E)

STATEMENT OF THE CASE

Following the dismissal of the adversary proceeding complaint against the husband, David Kimmel, and the finding by the bankruptcy court that it had no jurisdiction over Roberta Kimmel as a party to the adversary complaint, petitioner filed his Complaint Upon Transfers with Intent to Defraud Creditors under the provisions of the California Uniform Fraudulent Transfer Act, Cal. Civ. 3439, *et seq.* (CUFTA) on October 4, 2006 in the Superior Court of the State of California, County of San Francisco. The complaint is attached hereto as Appendix F. It alleged the entry into the Post Nuptial Property Agreement in July, 1995 was a fraudulent transfer agreement with the intent to prevent satisfaction of Mr. Rooz's judgment. It set out the basic facts that Mr. Rooz had obtained a judgment against Mr. David Kimmel on May 30, 1995; that the judgment was amended on September 27, 1997; that by May 30, 2006, the judgment was in the amount of $1,081,500. The complaint asserted that the spouses had made fraudulent transfers of properties, including surplus, from their substantial earnings, about $60,000 a year from the wife; that said earnings reasonably would be deposited into bank accounts and that said deposits had been available for satisfaction of the judgment. The complaint did not limit itself to the wages and deposits of Roberta Kimmel, but asserted that the Agreement transferred properties of the couple into her separate property. Available relief under the provisions of the CUFTA for all transfers was requested in the prayer for relief. The complaint alleged a continuing conspiracy to defeat the judgment of Mr. Rooz. The Kimmels did not record the Marital Agreement under the recording

statutes available to them and creditors were kept in the dark until the meeting in David's bankruptcy on December 7, 2005 (Cal. Family § 1502; Cal. Civ. § 1214).

The complaint was met with a notice of removal and a motion to reopen Roberta Kimmel's Chapter 7 and Enforce Permanent Discharge Injunction. An Answer to the complaint was filed in the federal bankruptcy court. She had filed for bankruptcy in the Northern District of California on July 7, 1993. She had obtained a discharge on March 15, 1994. The case had not been closed until March 26, 1997. The Trustee had reported no assets on August 23, 1995. The Agreement had been entered into prior to the closing of her estate with no assets in 1997.

Petitioner's Statement under Rule 9027(e) claimed that the matter involved a non-core proceeding. It granted the court discretion to hear or remand to the State Court and consented to the exercise of final judgment by the bankruptcy judge.

The debtor successfully precluded discovery in the federal court by filing her Motion for Judgment on the Pleading under Fed. R. Civ. P. 12(c). Mr. Rooz raised the question of entitlement to have discovery in the courts on his claims. At the hearing of March 9, 2007 petitioner moved for a remand to the state court.

The bankruptcy judge entered a Memorandum Decision on April 12, 2007. It is attached hereto as Exhibit C. The judge determined that although petitioner had stated a claim for relief under the provisions CUFTA he could not proceed for two reasons.

Firstly, it was held that California Law would not allow an action against a marital property agreement after 7 years following its entry. Since the agreement here was alleged to have been entered in 1995, the statute of limitations extinguished the claim. The judge rejected the contention that each deposit of the earnings into a bank account was a transfer upon which a cause of action accrues. It was asserted that Cal. Civ. § 3439.04, was unavailing because of the statute of limitations acting upon an agreement entered in July, 1995. The court further held that, even assuming the statute had not run, the injunctive provisions of the Bankruptcy Code (Code refers herein to the United States Bankruptcy Code, 11 U.S.C.) would arise upon the discharge of Roberta Kimmel in 1994. The injunction prevents any attempt of Mr. Rooz to obtain Mr. Kimmel's interest in her earnings (11 U.S.C. § 524(a)). The judge further held that the case was a core proceeding and should not be remanded to the State court. The state complaint of Mr. Rooz was dismissed with prejudice on April 11, 2007.

After timely appeal the Bankruptcy Appellate Panel for the Ninth Circuit upheld the ruling of the trial court that the application of the injunctive provisions of section 524(a)(3) required dismissal of the state complaint, as a matter of law and without an allowance of discovery. The court issued an Opinion and ordered publication on November 8, 2007 (Appendix B). Its ruling on the scope of the injunctive provisions made it unnecessary to determine the statute of limitations issues. The Bankruptcy Appellate Panel expanded the reasons for dismissal. It stated that the statutory language concerning waiver applied to the post bankruptcy transfer of properties by inter spousal agreement. It

stated that the community property of the couple, by operation of law, became part of the bankruptcy estate which was subject to remedy by the Trustee or petitioner at the time of the first party's bankruptcy even though no community assets were listed for distribution. It dismissed the claim that the Post Nuptial Agreement and the transfers under it created new debts which raised available remedies for the hindered creditor, discussing *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000). The Bankruptcy Appellate Panel found no equity which would recognize a misuse of bankruptcy proceedings since it held that section 524(a)(3) immunized the post petition transfer agreement. It found that Mr. Rooz failed to pursue his theories of conspiracy to hide assets under the otherwise available provisions of 11 U.S.C. § 727.

The Bankruptcy Appellate Panel had requested briefing on the Statute of Limitations defense.

REASONS FOR GRANTING THE PETITION

I. Whether federalism requires bankruptcy courts to grant creditor rights under a State Uniform Fraudulent Transfer Act after a determination to exercise jurisdiction is a significant issue to be decided by the Court.

A. Post petition fraudulent transfers raise unenforceability of injunctive relief under established equitable doctrines incorporated in Code § 105.

This Court has held that where the Trustee does not use his discretionary powers to enforce the Estate a creditor is free to pursue his state held rights and remedies regardless of the bankruptcy of the debtor. *Connell v. Walker*, 291 U.S. 1, 54 S. Ct. 257 (1934). The Court stated, p. 5:

> The right asserted is one given the creditor by state law which the Bankruptcy Act withdraws from him only upon the election of the trustee to assert the rights of the creditor, as he is privileged to do * * * an election which, in this case, does not appear to have been made.

Although the case was decided under the Bankruptcy Act of 1898, the statement applies to the matter here. The debtor-transferee here has no more right to obtain a dismissal and injunctive relief upon hiding assets than the debtor had to convert from Chapter 7 to Chapter 13 under the Code's section 105 for such conduct. *Marrama v. Citizens Bank of Massachusetts*, __ U.S. __, 127 S. Ct. 1105 (2007).

Bankruptcy jurisdiction, raised upon a state fraudulent transfer action, which is sought only for injunctive relief, is a related jurisdiction only. Equity will not support a scheme to hide assets from the creditor seeking relief under State Uniform Fraudulent Transfer Acts. Federal jurisdiction can only support rejection of the fraudulent scheme. Code § 105; 28 U.S.C. § 1367; *Connell, supra*; *Archer v. Warner*, 538 U.S. 314, 123 S. Ct. 1462 (2003); *Brown v. Felsen*, 442 U.S. 127, 99 S. Ct. 2205 (1979). The bankruptcy court erred in ruling that the removal petition raised a core proceeding. Jurisdiction is non exclusive acquisition when based upon a debtor removal of a fraudulent transfer action. 28 U.S.C. § 1334 (b), § 1367, § 157. *City of Chicago v. International College of Surgeons*, 552 U.S. 156, 118 S. Ct. 523 (1997); *Fietz v. Great Western Savings*, 852 F.2d 455 (9th Cir. 1988).

B. The entry into a post bankruptcy marital agreement is a jurisdictional event which terminates the reach of the Code's injunctive relief and prevents a dismissal with prejudice of an action based on State law.

There appears to be no dissent from the following bankruptcy law principles. A discharge protects the debtor from any attempt to establish personal liability for discharged debts (11 U.S.C. § 524(a)). A community debt is not discharged but the declared assets of the discharged spouse held pre-petition and the declared pre-petition community estate are subject to protection (Appendix C, p. 39a). *See Sanwa Bank California v. Chang*, (2001) 87 Cal. App. 4th 1314; Alan Pedlar, *Community Property and the Bankruptcy Reform Act*

of 1978, 11 St. Mary's L.J. 349, 383[1]. A judgment upon a community debt may be entered against the spouse who has not joined in the bankruptcy petition. In a community property state, the petitioning spouse must list all of his assets, whether owned as separate property or as community property (11 U.S.C. § 541(a)(2)). Dissent now arises as to creditor protection from fraud arising from a post petition marital transfer agreement upon on a subsequent filing of a no assets petition of the spouse against whom a judgment has been entered. The Opinion holds that the post petition transmutation of all the property of the couple into the separate property of the first discharged wife is protected by the provisions of 11 U.S.C. § 524(a)(3). The Opinion states that the injunctive provisions of the Code grant immunity to all of the transfers between the spouses. Due process concerns are remedied by the ability of the non petitioning spouse to obtain a hypothetical nondischargeable order. The reasoning must fall because the transmutation to make all assets of the couple the property of the wife has occurred post petition which precludes any hypothetical case and because the Opinion fails to address the consequences of the continuing transfers which, under state law, must be viewed from the stand point of the creditor, not the marital community. *Mejia v. Reed*, 31 Cal 4th 657 (2003).

---

1. F.n. 127, at p. 383: Section 524(a)(3) is not refined as it might have been. With respect to section 541(a)(2)(A) property, the section is clearly correct. With respect to property under the sole management and control of the nondebtor spouse, the debtor's creditors should not be barred unless all of this type of property passed to the estate, for the nondebtor's creditors have not had full access to all of this property for the satisfaction of their claims.

A California judgment creditor has a primary right to be protected from a plan to prevent satisfaction of his judgment through a marital property agreement. *Connell, supra*; *Mejia v. Reed*, 31 Cal 4th 657 (2003); *Filip v. Bucurenciu*, 129 Cal. App. 4th 825 (2005); *Wolkowitz v. Beverly*, 374 B.R. 221, *rev'd in part, dismissed in part*, __B.R. __, 2008 DJDAR 18795 (Bankr. 9th 2007); *Sanwa Bank v. Chang*, 87 Cal. App. 4th 1214 (2001); *Brenelli Amedeo v. Bakara Furniture Co.*, 29 Cal. App. 4th 1828 (1994) (involving corporate discharge); *Stoner v. Walsh*, 24 Cal. App. 3d 938 (1972).

As stated in 9c, American Jurisprudence, 2d, *Transfers between spouses* § 2270:

> Transfers between husband and wife, as well as parties who reside together as husband and wife, are subject to close scrutiny for purposes of determining whether they are merely contrivances used for the purpose of placing the debtor's property beyond the reach of creditors. The use of spouses as conduits through which funds of a debtor may be tapped while at the same time remaining unreachable by creditors will not be sanctioned. The burden of proving the bona fides of transfers between spouses is on the transferee. This burden may be satisfied, however, by a showing that, for years prior to the time at which the debtor's financial troubles began, the debtor customarily transferred his salary checks to his wife who, in turn, paid the debtor an allowance to cover his weekly expense requirements. [citing cases, footnotes omitted].

As stated in 5 Collier on Bankruptcy, *Fraudulent Transfers in Community Property States* § 548.12, p. 548-88:

> A second issue that arises in community property states involves transfers between spouses. Such transfers must be closely scrutinized for fairness to creditors, for by transmuting community property to separate property, a spouse thereby puts the property beyond the reach of the other spouse's creditors. If the transmutation renders the transferor insolvent, a fraudulent transfer has occurred. The Ninth Circuit in *Britt* v. *Damson* correctly recognized the applicability of fraudulent transfer law to inter-spousal transfers; however, its analysis of fair value in such transfers should be reconsidered. [citing cases, footnotes omitted]

There never have been holdings of community property declared by the spouses in the bankruptcy of Mrs. Kimmel or Mr. Kimmel. Community property only arises in the proceedings under CUFTA when equitable remedies are used to protect creditors and debtors. Its description arises in the context of equitable remedies to rearrange what the parties have unlawfully sought to create. *Wolkowitz v. Beverly*, *supra*. Equity rearranges for the benefit of the creditor what would have been community property but which has been transmuted to allow for the second bankruptcy.

The record shows that the second to petition spouse has filed a no asset petition. At such a patent display of

hiding, the creditor is entitled to his rights under state law. It is noted that under Cal. Family sec. 1000 separate property can be required to satisfy judgments based upon tortious acts if the acts were done for benefit of the community. 11 U.S.C. § 524(a) does not reach fraudulently transferred property. The claim of separate property only raises CUFTA and *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000), discussed below.

C. The failure to protect the creditor from fraudulent transfers places the Ninth Circuit in conflict with the Seventh and Sixth Circuits.

The nondischargeability provisions of the Code's section 523 further enforce the grounds of error in the denial of relief to the creditor under bankruptcy power. These sections express a Congressional will that only honest but unfortunate debtors are able to utilize the bankruptcy laws. The Opinion and affirmation below, then, are in conflict with Seventh Circuit in *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000). *McClellan* holds that section 523(a)(2)(A) applies to each transfer made with the intent to defeat creditor liens or judgments. Each such transfer raises a new debt which the bankruptcy court will remedy. The Bankruptcy Appellate Panel for the Sixth Circuit has adopted *McClellan* in *Mellon Bank v. Vitanovich*, 259 B.R. 873 (Bankr. 6th 2001).

D. Anti-waiver provisions do not protect voluntary transmutations.

The Opinion of the Bankruptcy Appellate Panel states that the injunction provisions protecting community earnings may not be waived. This ruling conflicts with a contrary conclusion by this Court. The Court has stated that such anti-waiver provisions are made to protect creditor overreaching and do not tolerate hiding assets in bankruptcy. *Marrama v. Citizens Bank of Massachusetts*, __ U.S. __, 127 S. Ct. 1105, p. 1111-1112 (2007).

E. The liability of a transferee holding property of a debtor is not based on personal liability but upon holding property of another to defeat judgments.

The Opinion does not support, without discussion, a prior panel which had observed that following a no asset finding and a closing of the estate, the Trustee would be deemed to have abandoned claims to the assets of the bankrupt. They then are available to the individual creditors. *Schwaber v. Reed*, 940 F.2d 1317 (9th Cir. 1991). *Sanwa Bank of California v. Chang*, 87 Cal. App. 4th 1314 (2001); *Brenelli Amedeo v. Bakara Furniture Co.*, 29 Cal. App. 1828 (1994); *Innk L. & C. Co. v. Kenkel*, 493 N.W.2d 818 (Iowa 1992), *citing FDIC v. Davis*, 733 F.2d 1083 (4th Cir. 1984); *Omni Development Corp. v. Atlas Assur.*, 956 P.2d 665, at 670 (Colo. App. 1998):

> Upon abandonment, the debtor's estate is divested of control of the property, and it

> becomes available to creditors to the extent they may have an interest in such property. Interested parties may use the legal procedures available under state law to obtain legal possession of the property to satisfy a debt owed.

Sanwa Bank California v. Chang, 87 Cal. App. 4th 1314, 1319 (2001):

> The injunction created by George's discharge does not protect the residence from the present fraudulent conveyance action because it was pre-bankruptcy property, not after-acquired property, and it was never made a part of the bankruptcy estate. . . .
>
> Jean's argument that Sanwa Bank deliberately followed this course of action in order to get the better of George's other creditors is to no effect. She cannot be heard to complain on their behalf when there is no legal basis in the Bankruptcy code or elsewhere to support her position.

The wife has become a third party transferee whose holdings are reachable by the creditor following disclaimer by the Trustee. *Connell, supra; Wolkowitz v. Beverly, supra*; *Kathy B. Enterprises, Inc. v. United States*, 779 F.2d 1413 (9th Cir., 1986). *In re Blatstein, 718 Arch St., Assoc., Ltd v. Blatstein*, 192 F.3d 88 (3d Cir., 1999); *Craft v. United States*, 65 F. Supp. 2d 651 (W.D. Mich., 1999), *citing Dixon v. Bennett*, 72 Md. App. 620, 531 A.2d 1318 (1987).

CONCLUSION

For the foregoing reasons, it is requested that the Court enter its order reversing the dismissal of the complaint of petitioner or that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

MAXWELL KEITH
133 Commonwealth Avenue
San Francisco, CA 94118
(415) 387 1531

Attorney for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED NOVEMBER 25, 2008

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 08-60004

BAP No. NC-07-1152-DMkK

In the Matter of ROBERTA KIMMEL,

Debtor,

WILLIAM B. ROOZ,

Appellant,

v.

ROBERTA KIMMEL,

Appellee.

Appeal from the Ninth Circuit Bankruptcy
Appellate Panel
Dunn, Markell, and Klein,
Bankruptcy Judges, Presiding

Argued and Submitted October 23, 2008
San Francisco, California

Appendix A

MEMORANDUM*

Before: BRUNETTI, ARCHER,** and CLIFTON, Circuit Judges.

William B. Rooz ("Rooz") appeals the judgment of the Ninth Circuit Bankruptcy Appellate Panel ("BAP") affirming the bankruptcy court's dismissal of Rooz's complaint following the grant of Roberta Kimmel's Rule 12(c) motion for judgment on the pleadings. We have jurisdiction pursuant to 28 U.S.C. § 158, and we affirm.

The Bankruptcy Panel, affirming the bankruptcy court, ruled that Rooz's claim under California's Uniform Fraudulent Transfer Act was barred by the discharge injunction of 11 U.S.C. § 524(a)(3). We affirm for the reasons stated in the BAP's opinion filed November 8, 2007.

AFFIRMED.

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Glenn L. Archer, Jr., United States Circuit Judge for the Federal Circuit, sitting by designation.

APPENDIX B — OPINION OF THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT FILED NOVEMBER 8, 2007

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

BAP No. NC-07-1152-DMkK

Bk. No. 93-33089

Adv. No. 06-03169

In re

ROBERTA KIMMEL,

Debtor.

WILLIAM B. ROOZ,

Appellant,

v.

ROBERTA KIMMEL,

Appellee.

Argued and Submitted on September 19, 2007
at San Francisco, California.

Filed – November 8, 2007

Appendix B

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Dennis Montali,
Bankruptcy Judge, Presiding

OPINION

Before: DUNN, MARKELL and KLEIN, Bankruptcy Judges.

DUNN, Bankruptcy Judge.

This appeal turns on the meaning of the community property discharge under 11 U.S.C. § 524(a)(3).[1] The bankruptcy court ruled that the community property discharge entered in the case of one spouse forever discharged the entire community from then-existing community claims and that after-acquired community property could not later be liable for such a claim, notwithstanding a subsequent judgment against the non-filing spouse in his separate individual capacity. Because this conclusion was correct and rendered irrelevant all of the appellant creditor's theories for attacking what was later done with community property after a post-bankruptcy judgment was obtained against the non-filing spouse, we AFFIRM.

---

1. Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as in effect before October 17, 2005, the effective date of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. 109-8, 119 Stat. 23.

Appendix B

I. FACTS

The dispute dates from 1991, when William B. Rooz ("Rooz") sued David Kimmel and his wife Roberta Kimmel in the San Mateo County (California) Superior Court ("1991 Litigation"). In 1993, Roberta Kimmel filed a voluntary chapter 7 case, in which a discharge was entered in 1994. Thereafter, the 1991 Litigation proceeded against David Kimmel individually and resulted in a judgment against him personally in May 1995 ("1995 Judgment").

In July 1995, the Kimmels entered into a written postnuptial agreement ("Postnuptial Agreement") under California law, with the intention and effect of transmuting Roberta Kimmel's future wages from community property to her separate property.

Some ten years later, in October 2005, David Kimmel filed his own voluntary chapter 7 case when Rooz began collection activity by obtaining a writ of execution from the San Mateo County Superior Court on the 1995 Judgment. Rooz asserts he first learned of the Postnuptial Agreement when he attended David Kimmel's § 341(a) meeting of creditors.

Rooz filed an adversary proceeding in David Kimmel's bankruptcy case ("David Kimmel Bankruptcy Litigation"), seeking a determination that the 1995 Judgment was nondischargeable. After learning of the Postnuptial Agreement, Rooz amended his complaint to add Roberta Kimmel as a defendant. The bankruptcy

court held that the 1995 Judgment debt was dischargeable as to David Kimmel, and dismissed Rooz's claim against Roberta Kimmel for lack of jurisdiction. We affirmed in a memorandum disposition, *Rooz v. Kimmel (In re Kimmel*), No. NC-06-1252-PaDB (9th Cir. BAP December 29, 2006), which Rooz further appealed to the Ninth Circuit as its No. 07-15155, and which has not yet been decided by that court.

After Roberta Kimmel was dismissed from the David Kimmel Bankruptcy Litigation, and while Rooz's prior appeal was pending before us, Rooz commenced new litigation against Roberta Kimmel in the San Mateo County Superior Court (the "2006 Litigation") to recover a portion of the Kimmels' community property. He sought to recover only that portion of such property consisting of David Kimmel's community property interest in Roberta Kimmel's wages. As that interest, however, had been transferred to Roberta Kimmel under the Postnuptial Agreement, Rooz attacked the Postnuptial Agreement as a fraudulent transfer under California's Uniform Fraudulent Transfer Act. Cal. Civ.Code § 3439, et seq. In response, Roberta Kimmel reopened her 1993 bankruptcy case, removed the 2006 Litigation to the bankruptcy court, and moved for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) ("Rule 12(c) Motion"), which is made applicable in bankruptcy adversary proceedings by Fed. R. Bankr.P. 7012(b).

In granting Roberta Kimmel's Rule 12(c) Motion, the bankruptcy court determined that any attempt to

collect the 1995 Judgment from Roberta Kimmel's wages, even if they remained community property despite the Postnuptial Agreement, was barred by the discharge injunction provided in § 524(a)(3), which arose at the time Roberta Kimmel's discharge was entered in 1994. Hence, the characterization of the 1995 transmutation of wages as a fraudulent transfer was irrelevant. Alternatively, the bankruptcy court held that Rooz's fraudulent transfer action was barred by Cal. Civ.Code § 3439.09(c), which provides that such an action is extinguished after seven years. *Rooz v. Kimmel (In re Kimmel)*, 367 B.R. 166, 170-74 (Bankr.N.D.Cal.2007).

This timely appeal ensued.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(1) and (b)(2)(H) and (O). We have jurisdiction pursuant to 28 U.S.C. § 158.

III. ISSUE

Whether the 1994 discharge of Roberta Kimmel protected future-acquired community property from enforcement of a discharged community claim.

IV. STANDARDS OF REVIEW

We review de novo the dismissal of a complaint on a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). *Ventress v. Japan Airlines*, 486 F.3d 1111, 1114 (9th Cir.2007).

Appendix B

V. DISCUSSION

This appeal reflects an attempt to vitiate the discharge entered in the 1993 Roberta Kimmel bankruptcy case. Rooz's cause of action in the 1991 Litigation involved a claim that was allowable as a community claim in the 1993 bankruptcy. The black-letter law embodied in § 524(a)(3) provides that Roberta Kimmel's discharge protects all after-acquired community property from claims of creditors of either spouse. Hence, to the extent the 1995 judgment against David Kimmel had validity, it only could be enforced against him personally.

We focus on the effect of the § 524(a)(3) community property discharge on California's rule that community property is liable for debts of an individual spouse. Cal. Fam.Code § 910.

A. *Roberta Kimmel's Bankruptcy Discharge*

Although Rooz concedes that the discharge injunction imposed by § 524(a)(2) protects Roberta Kimmel from liability for causes of action asserted in the 1991 Litigation, he contends that the putative community property interest (after he avoids the 1995 transmutation as a fraudulent transfer) in her post-1995 wages is vulnerable to enforcement of the 1995 Judgment against David Kimmel. As the bankruptcy court correctly ruled, Rooz's theory misconstrues and offends the community property discharge injunction imposed by § 524(a)(3).

Appendix B

Understanding the community property discharge embodied in § 524(a)(3) begins with the definitions of "creditor" and "community claim" and the provision regarding community property as property of the estate.

1. *Rooz was a "creditor" on a "community claim" in 1993*

Rooz unambiguously was a "creditor" holding a "community claim" in the 1993 Bankruptcy.

> The term "creditor," as defined by § 101(10), means:
>
> (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;
>
> . . . ; or
>
> (C) entity that has a community claim.
>
> The term "community claim" is defined in § 101(7) as a:
>
> . . . claim[2] that arose before the commencement of the case concerning the

---

2. Pursuant to § 101(5), a "claim" is a

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(Cont'd)

> debtor for which property of the kind specified in section 541(a)(2) of this title is liable, *whether or not there is any such property at the time of the commencement of the case.*

(Emphasis added.)

At the time Roberta Kimmel filed her bankruptcy case in 1993, Rooz was a "creditor" by virtue of § 101(10)(A) and § 101(10)(C). He had asserted a claim against Roberta Kimmel by virtue of the 1991 Litigation in which he was suing both Kimmels. Moreover, it was a "community claim" under § 101(7) because it was enforceable against the property of the Kimmel community.

Because community claims may be asserted, and are subject to discharge, in the bankruptcy of one spouse, the Bankruptcy Code provides that community property is brought into the estate of that spouse. The definition of property of the estate includes, by virtue of § 541(a)(2):

> All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(Cont'd)

> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

> (A) under the sole, equal, or joint management and control of the debtor; or
>
> (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

Construing §§ 101(7) and 541(a)(2) together, a community claim, for bankruptcy purposes, is a prepetition claim for which the Kimmels' community property was liable, whether or not such claim had proceeded to a judgment or otherwise was liquidated on the petition date.

In California, this is particularly significant because California community property is exposed to claims against an individual spouse. Cal. Fam.Code § 910(a).[3]

---

3. California Family Code § 910(a) provides:

> (a) Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt.

Family Code § 902 defines the term "debt" in § 910(a) as:

> "Debt" means an obligation incurred by a married person before or during marriage, whether based on contract, tort, or otherwise.

Appendix B

A consequence of the alignment of §§ 101(7) and 541(a)(2) is that the nonexempt community property existing at the time of the filing of the petition is liable for payment of community claims.

2. *Community claims can be discharged to the benefit of the non-filing spouse*

Under § 524(a)(3), Roberta Kimmel's discharge permanently enjoined enforcement of the 1995 Judgment against all future-acquired community property, including both her own and David Kimmel's interests in her wages.[4] Regardless of whether the

---

4. Section 524(a)(3) provides:

> A discharge in a case under this title—. . .
>
> (3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

community claim was attributable to the actions of the debtor spouse, the nondebtor spouse, or both, the effect of § 524(a)(3) is that all community property acquired post-bankruptcy is protected by the discharge.

We previously have noted in dictum that § 524(a)(3) can operate to provide nondebtor spouses with a de facto partial discharge of their separate debts by enjoining a creditor from attaching community property in which the nondebtor spouse has an interest:

> [A] nondebtor spouse in a community property state typically benefits from the discharge of the debtor spouse. According to Section 524(a)(3), after-acquired community property is protected by injunctions against collection efforts by those creditors who held allowable community claims at the time of filing. This is so even if the creditor claim is against only the nonbankruptcy spouse; the after-acquired community property is immune.

Burman v. Homan (In re Homan), 112 B.R. 356, 360 (9th Cir. BAP 1989) (citation omitted). In other words, the personal liability of a nondebtor spouse that survives the bankruptcy only can be enforced against property of the nondebtor spouse that is not community property.

Although the nondebtor spouse is not actually discharged of liability, the consequence of § 524(a)(3) is that the property that is vulnerable to judgment

enforcement against a nondebtor spouse is diminished by the protection of after-acquired community property. Hence, a judgment creditor of the nondebtor spouse on a community claim loses the ability to collect from anything other than the judgment debtor's separate property.

There is also a temporal aspect to the § 524(a)(3) discharge injunction in the sense that it applies only so long as there is community property. Dissolution of the marriage or death of a spouse terminates the community, at which point after-acquired community property loses its § 524(a)(3) protection. 4 Collier on Bankruptcy ¶ 524.02[3][c] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.2007).

None of this, however, means that nondischargeability concepts do not apply to community claims. If a debt on a community claim would be excepted from discharge in a bankruptcy of the nondebtor spouse, then § 523(a)(3) provides that a nondischargeability action directed at the nondebtor spouse can be initiated in order to establish an exception to the allowable community claims that are discharged. The operative statutory language provides that the protection of after-acquired community property from liability for a prepetition community claim does not apply when the claim "is excepted from discharge . . . [or] would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a [hypothetical] case concerning the debtor's spouse commenced on the date of the filing of the petition. . . ." 11 U.S.C. § 524(a)(3).

Similarly, an objection to discharge may be focused on the nondebtor spouse. Under § 524(b)(2), if the court would not grant the nondebtor spouse a discharge in a hypothetical case filed on the date of the filing of the debtor spouse's petition, or if the nondebtor spouse has been denied a discharge within the preceding six years, then the community property discharge does not apply. 11 U.S.C. § 524(b)(2).[5]

The net result is that §§ 524(a)(3) and 524(b)(2) combine to prevent a wrongdoer from hiding behind an innocent spouse's discharge, but correlatively require the innocent spouse in a community property state to bear some burden of responsibility for the wrongdoing spouse. 4 Collier on Bankruptcy ¶ 524.02 [3].

---

5. Section 524(b)(2) provides:

> (b) Subsection (a)(3) of this section does not apply if—
>
> . . .
>
> (2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; *and*
>
> (B) a *determination* that the court would not so grant such discharge *is made by the bankruptcy court within the time and in the manner provided for a determination under section 727* of this title of whether a debtor is granted a discharge.

(Emphasis added.)

Appendix B

These provisions for nondischargeability and objection-to-discharge actions directed at the nondebtor spouse are, however, subject to a diligent creditor requirement. The failure by creditors to raise nondischargeability and discharge objection issues in a timely manner in the case of the debtor spouse will allow the community property discharge to be effected.

If creditors are not diligent, as one commentator has explained, "the Devil himself could effectively receive a discharge in bankruptcy if he were married to Snow White." Alan Pedlar, *Community Property and the Bankruptcy Act of 1978*, 11 St. Mary's L.J. 349, 382 (1979); *cf. Gonzales v. Costanza (In re Costanza)*, 151 B.R. 588, 590 (Bankr.D.N.M.1993) ("I would add: if [the Devil] does not treat her better than his creditors, [Snow White] will, by divorcing him, deny his discharge.").

Rooz did not file a complaint in Roberta Kimmel's bankruptcy case, either as a nondischargeability action or as an objection to discharge, directed at either of the spouses.[6] Accordingly, Rooz long ago waived his right

6. As Rooz had notice of the Roberta Kimmel bankruptcy case at a time he was suing both spouses, none of the due process concerns attendant to lack of notice regarding the nondebtor spouse are present here. Pedlar, 11 St. Mary's L.J. at 385 & 389-90; *accord, In re Schmiedel*, 236 B.R. 393, 397-98 (Bankr.E.D.Wis.1999); *Seattle First Nat'l Bank v. Marusic (In re Marusic)*, 139 B.R. 727, 732 n. 3 (Bankr.W.D.Wash.1992); *In re Sweitzer*, 111 B.R. 792, 797-99 (Bankr.E.D.Wis.1990); 4 Collier on Bankruptcy ¶ 524.02[3][c].

to assert that Roberta Kimmel's discharge does not enjoin him from attaching after-acquired community property to satisfy his claim against David Kimmel. Even if her wages remain community property notwithstanding the Postnuptial Agreement, David Kimmel's interest in that community property is immune pursuant to § 524(a)(3) from any attempt by Rooz to collect on the 1995 Judgment.

3. *Community property assets automatically become estate property when a bankruptcy case is commenced*

At oral argument, Rooz urged that, as a condition to a debtor receiving a discharge of community debts, the debtor must make community assets available for administration through the bankruptcy estate. On Roberta Kimmel's schedules of current income and current expenses (Schedules I and J) filed in her bankruptcy case, she included no monthly income and no monthly expenses, and instead stated that she had "no income and depends entirely on her parents to provide for her needs." Rooz contends this demonstrates that Roberta Kimmel failed to contribute her community property wages for administration for the benefit of creditors. We disagree.

Section 541 is self effectuating. Roberta Kimmel's bankruptcy estate was created when she filed her voluntary chapter 7 petition; community property in which she had an interest automatically went into the estate by the mere fact of its existence. Whether it was

listed on the schedules is irrelevant. To the extent back wages were owed to her at the time she filed her petition in 1993, they were subject to administration by the chapter 7 trustee.

Rooz did not challenge the accuracy of Roberta Kimmel's schedules in 1993 by questioning her entitlement to discharge or otherwise. Nor has he identified any property that existed but was not scheduled. Nor is there any indication that the trustee who administered Roberta Kimmel's bankruptcy estate failed to perform the trustee's duties under § 704, which include an obligation to collect property of the estate for the benefit of creditors and to investigate the financial affairs of the debtor.

Finally, whether Roberta Kimmel had no income in 1993 that became part of her bankruptcy estate is irrelevant to the application of her chapter 7 discharge to postpetition community property, such as postpetition wages.

The bankruptcy court correctly held that Roberta Kimmel's discharge enjoined Rooz from attaching her post-discharge wages, whether they were community property or separate property.

4. *Post-Discharge Conduct Does Not Vitiate a Discharge*

Rooz contends that Roberta Kimmel's post-discharge conduct in participating in the 1995

Postnuptial Agreement creates a new debt. His argument lacks merit for two independent reasons.

First, the chapter 7 discharge is absolute and, in light of the anti-waiver provisions of § 524(a), does not admit of an equitable exception that would permit it to be waived by postdischarge conduct. *Lone Star Sec. & Video, Inc. v. Gurrola (In re Gurrola*), 328 B.R. 158, 172 (9th Cir. BAP 2005). In the case of § 524(a)(3), the anti-waiver language is "whether or not discharge of the debt based on such community claim is waived." 11 U.S.C. § 524(a)(3).

For the reasons we explained in *Gurrola,* Congress was emphatic that the anti-waiver language in § 524(a) was "intended to prevent waiver of discharge of a particular debt from defeating the purposes of this section." *Gurrola,* 328 B.R. at 170 (quoting H.R. Rep. No. 95-595, at 366 (1977); S.Rep. No. 95-989, at 80 (1978)).

Second, a false premise underlies Rooz's theory that, by executing the Postnuptial Agreement, Roberta Kimmel made a fraudulent conveyance that rendered the 1995 Judgment uncollectible, thereby creating a new debt that is not discharged. The false premise is that, in the absence of the Postnuptial Agreement, the 1995 Judgment could have been collected from community property.

As we have explained, § 524(a)(3) enjoins any act "to collect or recover from" community property "that is acquired after commencement of the case, on account

of an allowable community claim" that has not been excepted from discharge in the bankruptcy case. 11 U.S.C. § 524(a)(3). Thus, it was impossible for the community property (Roberta Kimmel's future wages) that was transmuted into separate property to have been a source of recovery for Rooz. We agree with the bankruptcy court that Rooz's further efforts to collect from Roberta Kimmel's post-bankruptcy wages "likely violate [the discharge injunction of § 524] and expose [Rooz] to sanctions." *Kimmel*, 367 B.R. at 174 n. 11.

The Seventh Circuit decision in *McClellan v. Cantrell*, 217 F.3d 890, 895 (7th Cir.2000), upon which Rooz relies, does not support his theory. No relevant event in that case occurred post-bankruptcy. Rather, it involved a prepetition fraud, not involving a misrepresentation, that was perpetrated by the debtor in league with a sibling. The question was whether the term "actual fraud" in § 523(a)(2) encompassed more than situations in which there was a misrepresentation. The Seventh Circuit's answer in the affirmative merely served to sharpen the contours of what constitutes a nondischargeable prepetition "actual fraud" debt under § 523(a)(2) and has no bearing on the present case.

B. *The Postnuptial Agreement*

In the proceedings before the bankruptcy court, the parties addressed at length the irrelevant question of the impact of the provisions of California's version of the Uniform Fraudulent Transfer Act ("UFTA"), codified at Cal. Civ.Code §§ 3439 et seq., on the Postnuptial Agreement.

Appendix B

The bankruptcy court gave Rooz's UFTA argument short shrift because any such action was time-barred under Cal. Civ.Code § 3439.09(c)[7] and because "if there were no time bar, Rooz's claim would be barred by the Bankruptcy Code [§ 524(a)(3)]." *Kimmel*, 367 B.R. at 170.

In view of the controlling effect of the community property discharge injunction imposed by § 524(a)(3), the bankruptcy court's conclusion (with which we have no quarrel) that the UFTA cause of action filed eleven years after the challenged transfer is barred was addressed to a moot point.

Regardless of whether the 1995 transmutation validly shifted Roberta Kimmel's future wages from community to separate property status, all wages she earned after filing her 1993 chapter 7 case were immune from enforcement of Rooz's 1995 judgment against David Kimmel, which was a discharged community claim as of 1994.[8]

---

7. Section 3439.09(c) of the California Civil Code provides:

> Notwithstanding any other provision of law, a cause of action with respect to a fraudulent transfer or obligation is extinguished if no action is brought or levy made within seven years after the transfer was made or the obligation was incurred.

8. Thus, Rooz's argument, made for the first time on appeal, that the Postnuptial Agreement was invalid because it was not recorded is unavailing.

C. *The Rule 12(c) Motion*

Under Fed.R.Civ.P. 12(c), judgment on the pleadings is proper when, taking all the allegations in the non-moving party's pleadings as true, the movant is entitled to judgment as a matter of law. *Ventress*, 486 F.3d at 1114 (*quoting Fajardo v. County of Los Angeles*, 179 F.3d 698, 699 (9th Cir.1999)).

As we have explained, Roberta Kimmel's discharge operates to enjoin, as a matter of law under § 524(a)(3), any attempt by Rooz to collect the 1995 Judgment from Roberta Kimmel's property, be it her separate property, or either her own or David Kimmel's interest in community property if the Postnuptial Agreement were set aside. The judgment on the pleadings was correct.

VI. CONCLUSION

The court correctly determined that Rooz's claim, finalized in the 1995 Judgment, was a community claim (1) that was discharged in Roberta Kimmel's bankruptcy case, and (2) from which all interests in her future wages were insulated, regardless of whether her wages constitute community property. Accordingly, the order of the court dismissing the 2006 Litigation pursuant to its grant of the Rule 12(c) Motion is AFFIRMED.

APPENDIX C — MEMORANDUM DECISION REGARDING CREDITOR'S POST-DISCHARGE ATTEMPTS TO COLLECT JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED APRIL 11, 2007

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 93-33089
Chapter 7

Adv. No. 06-3169

In re

ROBERTA KIMMEL,

Debtor.

WILLIAM ROOZ,

Plaintiff,

v.

ROBERTA KIMMEL,

Defendant.

Appendix C

MEMORANDUM DECISION REGARDING CREDITOR'S POST-DISCHARGE ATTEMPTS TO COLLECT JUDGMENT

A debtor's discharge in bankruptcy would not do her much good if her pre-petition creditors could still garnish her wages to pay their claims. The creditor in this case has a creative theory for doing just that: he argues that her discharge did not affect his claim against her husband, that her husband had an interest in her wages as community property, and that her husband fraudulently transferred that interest to her by entering into a postnuptial agreement. The creditor's fraudulent transfer claim, besides being untimely, is barred by Section 524(a)(3),[1] which enjoins holders of pre-petition community claims from collecting or recovering from community property acquired post-petition.

---

1. The following discussion constitutes the court's findings of fact and conclusions of law. Fed. R. Bankr.P. 7052 (incorporating by reference Fed.R.Civ.P. 52(a)).

Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. 109-8, 119 Stat. 23, because the bankruptcy cases at issue were filed before its effective date (generally October 17, 2005).

This memorandum decision is being filed concurrently in the bankruptcy cases of both Roberta Kimmel (93-33089) and David Kimmel (05-35269).

Appendix C

I. *Facts*

In 1991 creditor William Rooz ("Rooz") filed an action against Roberta Kimmel ("Roberta") and David Kimmel ("David") (San Mateo Superior Ct., Case No. 368482) (the "Original Action"). Roberta filed a voluntary Chapter 7 petition in 1993 (Case No. 99-33089) and thereafter received her discharge. Rooz continued to prosecute the Original Action against David. In May of 1995 Rooz obtained a judgment against David (the "Judgment"). Rooz alleges that the total Judgment debt with interest and attorneys' fees is now over $1 million.

Around July of 1995 David entered into a Postnuptial Agreement with Roberta. No party has provided the court with a copy of that agreement. Rooz does not dispute that the agreement complies with the California Family Code but he asserts that it transfers to Roberta community property that would otherwise be available to satisfy the Judgment.

In October of 2006 Rooz filed a complaint against Roberta and Doe defendants in state court (the "Complaint") asserting claims under the California version of the Uniform Fraudulent Transfer Act, Cal. Civ.Code §§ 3439 et seq. ("UFTA") and for "a continuing conspiracy to deprive [Rooz] of payments they were obligated to pay under the [J]udgment" (San Francisco Superior Court, Case No. CGC-06-456731). The conspiracy claim is somewhat vague but Rooz has clarified that it relies on his UFTA theories.

Appendix C

The purported community property described in the Complaint is Roberta's salary earned after the Postnuptial Agreement became effective, alleged to be approximately $60,000 per year. Rooz argues that Roberta's salary is community property but that the Postnuptial Agreement transmutes the salary into her separate property either when it is received, or when it is deposited into her account, or both.[2] Rooz argues in the alternative that he can avoid the Postnuptial Agreement itself.[3]

In response to the Complaint Roberta filed a motion to reopen her bankruptcy case, which was granted, and she removed the action to this court. Roberta also filed an answer and a motion for judgment on the pleadings in this removed action.

Meanwhile David filed his own voluntary Chapter 7 petition on October 16, 2005 (Case No. 05-35269). Rooz contested the dischargeability of the Judgment (A.P. No. 06-3047) but the court eventually dismissed that adversary proceeding with prejudice. Rooz appealed the

---

2. The Complaint alleges (¶ 16) that Roberta's salary and funds deposited into her account "at least four years last past, and up to October 15, 2005, are subject to an accounting and an award to Mr. Rooz as the creditor of Mr. David Kimmel under the [J]udgment."

3. The Complaint does not actually claim that the Postnuptial Agreement was a fraudulent transfer, but the court treats Rooz's arguments on that issue as a proposed amendment to the Complaint.

dismissal to the Bankruptcy Appellate Panel of the Ninth Circuit which affirmed in an unpublished Memorandum (BAP No. NC-06-1252-PaDB). In January of 2007 Rooz appealed that decision to the Court of Appeals for the Ninth Circuit (C.A. No. 07-15155).

David's bankruptcy case was closed after he received his discharge. He filed a motion to reopen his bankruptcy case (which had already been reopened by Rooz, but under conditions that might cause it to be closed again). David combined this motion to reopen with a motion to enforce the discharge injunction of Section 524, which he asserts is being violated by this removed action against Roberta. He and Roberta are represented by the same bankruptcy counsel.

Rooz filed opposition papers to these motions, Roberta and David filed replies, and these matters came on for hearing on March 9, 2007. Rooz did not file a written motion to remand this removed action but at oral argument, after the court noted the lack of any such motion, his counsel made an oral motion to remand.

II. *Jurisdiction, and oral remand motion*

The court is satisfied that it has jurisdiction, that this is a core proceeding, and that remand is inappropriate. Roberta and David argue that Rooz's action is barred by the discharge injunction. *See* 11 U.S.C. § 524. Determining what is and is not covered by the discharge injunction is a core proceeding that is properly decided by this court. The associated

issues of California law are not complex and deciding them in this forum will not prejudice Rooz. His oral motion for remand is untimely and is not persuasive on the merits. It will be denied. *See* 28 U.S.C. § 157(b)(2)(I) and (O); 28 U.S.C. §§ 1334, 1441, and 1452.[4]

III. *Discussion*

There is no dispute that California permits postnuptial agreements to transmute community property into separate property, but such transmutation can amount to a fraudulent transfer. For example, when a husband transferred his interest in a community property house to his wife, that was held to be a fraudulent transfer in *Reddy v. Gonzalez,* 8 Cal.App.4th 118, 10 Cal.Rptr.2d 55 (1992), *disapproved on other grounds by Annod Corp. v. Hamilton & Samuels,* 100 Cal.App.4th 1286, 1293, 123 Cal.Rptr.2d 924, 928 (2002).

More recently, a California Court of Appeal has held that a marital agreement transmuting future wages into separate property was a fraudulent transfer. *State Board of Equalization v. Woo,* 82 Cal.App.4th 481, 483-84, 98 Cal.Rptr.2d 206, 208 (2000) (rejecting argument that wife's future earnings were a mere expectancy rather than community property in which husband had an interest).

---

4. The court also notes that Rooz's statement pursuant to Rule 9027(e)(3) includes the following: "Plaintiff asserts that the action is a non core proceeding but will consent to the entry of final orders or judgment by the bankruptcy judge."

Therefore the court assumes without deciding that Rooz states a claim for relief under the UFTA. The issues presented are whether that claim is time-barred under California law or else barred by Section 524 of the Bankruptcy Code.[5]

The right to maintain a UFTA action belongs to individual creditors prior to bankruptcy. Once the bankruptcy case is commenced the automatic stay prevents those creditors from interfering with the right that has passed to the trustee as the representative of all creditors. *See, e.g., In re MortgageAmerica Corp.*, 714 F.2d 1266, 1275-78 (5th Cir.1983) (fraudulent transfer action vested in trustee, and automatic stay prohibited creditor from bringing such action). Once the case is closed, however, the automatic stay terminates (11 U.S.C. § 362(c)) and the right reverts to creditors.

A. *Rooz's UFTA claim is barred by the applicable California statute of repose*

Rooz alleges that he did not learn of the Postnuptial Agreement until recently, but provisions of the UFTA impose not only a four year statute of limitations but also a seven year statute of repose: "Notwithstanding any other provision of law, a cause of action with respect to a fraudulent transfer or obligation is *extinguished* if no action is brought or levy made within seven years

5. Roberta alleges that the California claims are barred because David's bankruptcy trustee has exclusive standing bring a UFTA action. The court disagrees.

after the transfer was made or the obligation was incurred." *See* Cal. Civ.Code § 3439.09(c) (emphasis added). The Postnuptial Agreement was entered into over seven years ago. Therefore, any attempt by Rooz to avoid it under the UFTA is time-barred. *See Roach v. Lee,* 369 F.Supp.2d 1194, 1197-1200 & n. 3 (C.D.Cal.2005) (fraudulent transfer claim barred, even though fraud was allegedly concealed and "[e]ven though [plaintiff] filed his complaint less than one year after discovering the fraud," because "he filed his complaint more than seven years after the fraudulent transfer.").

The Complaint anticipates this obstacle by treating each occasion when Roberta receives or deposits her paycheck as a separate transmutation of community property into separate property. The problem with this argument is that if the Postnuptial Agreement is not avoided then, by definition, Roberta's wages are already her separate property even before she receives or deposits them. Therefore there is no transmutation that could be the basis for any fraudulent transfer claim.

For all of these reasons, Rooz's UFTA claim is time-barred. Alternatively, even if there were no time bar, Rooz's claim would be barred by the Bankruptcy Code.

B. *Rooz's claims are barred by Section 524*

Rooz's Original Action against Roberta and David was filed in 1991, well before Roberta filed her Chapter 7 case in 1993. Therefore any personal liability that

Roberta had to Rooz, including any liability that she might have had as David's wife, was a pre-petition claim that was discharged in her bankruptcy case. Rooz cannot collect the Judgment from Roberta as a personal liability. *See* 11 U.S.C. § 524(a)(1) and (2).[6]

David has also received a discharge, and the court has dismissed Rooz's nondischargeability action against David. Unless that dismissal is reversed on appeal and Rooz ultimately prevails in his nondischargeability action, he cannot collect the Judgment as a personal liability of David either.

---

6. Section 524(a)(1) and (2) provide, in full:

> (a) A discharge in a case under this title—
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the *personal liability* of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a *personal liability* of the debtor, whether or not discharge of such debt is waived[.]

11 U.S.C. § 524(a)(1) and (2) (emphasis added).

Rooz argues in effect that he is not seeking to impose personal liability on either Roberta or David on account of his claims in the Original Action, but instead he is attempting to recover community property (Roberta's salary) that was fraudulently transferred to frustrate collection of his Judgment against David. The court assumes without deciding that recovering Roberta's wages and applying them to pay the Judgment would be something different from imposing personal liability on Roberta for the Judgment, because in this community property state she was not the sole owner of her wages prior to the Prenuptial Agreement. *But cf. Local Loan Co. v. Hunt,* 292 U.S. 234, 243-45, 54 S.Ct. 695, 78 L.Ed. 1230 (1934) (rejecting creditor's argument that enforcing assignment of future wages would be something other than imposing personal liability); *In re Miranda Soto,* 667 F.2d 235 (1st Cir.1981) (continuing vitality of *Hunt*); *In re Chetto,* 282 B.R. 215, 216-18 (Bankr.N.D.Ill.2002) (same).

Even applying that assumption, Rooz's claims are barred by the Bankruptcy Code's treatment of community claims, which are defined in Section 101(7) to mean claims "that arose before the commencement of the case concerning the debtor [Roberta] for which property of the kind specified in section 541(a)(2) [i.e., most community property[7]] is liable, whether or not

---

7. Section 541(a)(2) provides:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (Cont'd)

there is any such property at the time of the commencement of the case." 11 U.S.C. § 101(7). Rooz is asserting a community claim because he asserts that Roberta's wages are community property and that such property is liable for the Judgment against David. *See also In re Soderling*, 998 F.2d 730, 733 (9th Cir.1993) (explaining definition of community claim). Section 524(a)(3) provides:

> (a) A discharge in a case under this title—
>
> * * *
>
> (3) operates as an injunction against the commencement or continuation

---

(Cont'd

> * * *
>
> (2) *All interests of the debtor and the debtor's spouse in community property* as of the commencement of the case that is—
>
> (A) *under the sole,* equal, or joint *management and control of the debtor [i.e., Roberta];* or
>
> (B) *liable for* an allowable claim against the debtor, or for both an allowable claim against the debtor and *an allowable claim against the debtor's spouse [i.e., David],* to the extent that such interest is so liable.

11 U.S.C. § 541(a)(2) (emphasis added).

> of an action, the employment of process, or an act, to collect or recover from, or offset against, *property of the debtor of the kind specified in section 541(a)(2) of this title* [i.e., Roberta's wages] *that is acquired after the commencement of the case, on account of any allowable community claim,* except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

11 U.S.C. § 524(a)(3) (emphasis added).

Regardless whether David ever received a discharge, Section 524(a)(3) protects Roberta from any action, process, or act "to collect or recover from, or offset against" her wages "on account of" the Judgment against David. 11 U.S.C. § 524(a)(3). As summarized by a leading treatise, "after-acquired community property will be free from prebankruptcy creditor claims against

either spouse even when only one spouse [Roberta] has filed a bankruptcy case." 5 L. King et al., *Collier on Bankruptcy* (15th ed. Rev.) (" *Collier on Bankruptcy* ") ¶ 524.02[3][a], at pp. 524-27 to -28, text accompanying n. 80 (emphasis added).

The policy of Section 523(a)(3) is succinctly explained in *In re Costanza,* 151 B.R. 588, 589-90 (Bankr. D.N.M.1993):

> The discharge received by [wife] provides her a fresh start. It shields all her after acquired property from the claim[s] of her creditors, including community claims based upon her husband's wrongdoing. It provides the marital community, of which she is an equal member, a fresh start.[ ] Such is the clearly stated policy of Congress.
>
> . . . For those who wish to pursue the matter, there may be no better source than the article written by Alan Pedlar, *Community Property and the Bankruptcy Reform Act of 1978,* 11 St. Mary's L.J. 349 (1979) ["Pedlar, *Community Property* "]. The article suggests the possibility that "the Devil himself could effectively receive a discharge in bankruptcy if he were married to Snow White." *Id.* at 382. To this I would add: if he does not treat her better than his

> creditors, she will, by divorcing him, deny his discharge. [8]

The cases are uniform in recognizing this effect of Section 524(a)(3). *See, e.g., Soderling,* 998 F.2d at 733 ("[a]ll claims against a marital community are discharged," except for nondischargeable community claims); *In re Homan,* 112 B.R. 356, 360 (9th Cir. BAP 1989) (stating in dicta that after-acquired community property is immune from collection efforts, even if creditor's claim is only against nondebtor spouse); *In re Hull,* 251 B.R. 726, 732 (9th Cir. BAP 2000) (recognizing effect of Section 524(a)(3)); *In re Rollinson,* 322 B.R. 879, 883 (Bankr.D.Ariz.2005) (creditor's claim barred by Section 524(a)(3)); *In re Strickland,* 153 B.R. 909 (Bankr.D.N.M.1993) (same); *In re Schmiedel,* 236 B.R. 393 (Bankr. E.D.Wis.1999) (same).

Rooz was not without a remedy. Once Roberta filed her voluntary Chapter 7 petition Rooz had the opportunity to prove (a) that his claim was nondischargeable by Roberta, or (b) that his claim would be nondischargeable by David in what was then a hypothetical case by David, or (c) that David would be

---

8. A footnote omitted from the above quote states: "Section 524(a)(3) is only available to the marital community. Upon dissolution of the marriage its protection no longer exists. Collier, 3 Collier on Bankruptcy, ¶ 524.01[2] at n. 16 (15th ed.1992); Pedlar, *Community Property and the Bankruptcy Reform Act of 1978,* 11 St. Mary's L.J. 349 (1979) at n. 134." *Costanza,* 151 B.R. at 589 n. 5.

denied a discharge in his hypothetical case. *See* 11 U.S.C. § 524(a)(3) (nondischargeability) *and* § 524(b) (denial of discharge).[9] If Rooz had proved any one of these things then Section 524(a)(3) would not protect after-acquired community property. *See Rollinson*, 322 B.R. at 883 ("the economic sins of either spouse shall be visited upon the community property when a discharge is denied as to a community debt").

Rooz had only a limited time in Roberta's case in which to establish one of these things and the deadline for doing so has long since passed:

> As a result of the statutory scheme of subsections 524(a)(3) and (b), the bankruptcy court will often be called upon to determine the hypothetical discharge of a nondebtor spouse or to rule upon the hypothetical nondischargeability of one or more of the nondebtor's debts. Procedurally, section 524(b) requires a creditor to file an objection to the hypothetical discharge of the

---

9. Section 524(b) provides in relevant part, "Subsection (a)(3) of this section does not apply if—* * * (2)(A) the court would not grant the debtor's spouse [David] a discharge in a case under chapter 7 of this title concerning such spouse commenced on [Roberta's petition date]; and (B) a determination that the court would not so grant such a discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge." 11 U.S.C. § 524(b)(2).

> nondebtor spouse within the same time limits as an objection to the debtor's discharge as prescribed by Federal Rule of Bankruptcy Procedure 4004(a). Similarly, complaints to determine the nondischargeability of an obligation of the debtor or of an obligation of the nondebtor spouse in a hypothetical case commenced by such spouse must be filed within the time period set forth in Federal Rule of Bankruptcy Procedure 4007(c). Consequently, creditors must act diligently with respect to both the debtor and the nondebtor spouse to preserve their rights as to the discharge or dischargeability of their claims.

5 *Collier on Bankruptcy* ¶ 524.02[3][b] and [c], at pp. 524-29 to -32 (footnotes omitted).[10]

Nor is Rooz saved by *In re Maready*, 122 B.R. 378 (9th Cir. BAP 1991). In *Maready* the creditor had missed the deadlines to object to the discharge or dischargeability but the BAP held that the creditor could

---

10. There are no due process concerns because Rooz had notice of Roberta's bankruptcy case and knew that Roberta was then (and is now) David's spouse, so he could have filed a timely complaint in Roberta's case. *See Schmiedel*, 236 B.R. at 397-98 (creditor who had actual knowledge that nondebtor spouse was married to debtor had sufficient notice that Section 524(a)(3) would apply) (distinguishing *In re Sweitzer*, 111 B.R. 792, 797-99 (Bankr.W.D.Wis.1990) (dicta discussing potential due process concerns)).

still contest whether or not a claim was a community claim—the creditor could argue that Section 524(a)(3) did not apply because she held a separate claim against the non-debtor spouse, not a community claim. That does not help Rooz because his only theory for reaching Roberta's wages is that he holds a community claim-that he can collect the Judgment against David from Roberta's wages as community property.

To summarize, the holder of a community claim must take action in an innocent spouse's bankruptcy case, even if his real quarrel is with the nonfiling, wrongdoing spouse. Once the deadlines in the first spouse's case have passed, it is too late to collect a pre-petition community claim from after-acquired community property.

This is not to say that Roberta's discharge protected David's separate property or protected him from personal liability (which is the subject of Rooz's pending appeal to the Ninth Circuit). *See, e.g., In re Moore,* 318 B.R. 679 (Bankr.W.D.Wis.2004) (Section 524(a)(3) did not bar creditor from pursuing non-debtor's separate property). Her discharge does not extend that far, but Congress decided to protect after-acquired community property as a way of protecting the fresh start of the debtor (Roberta) even thought non-debtor spouses (David) are thereby somewhat protected. 5 *Collier on Bankruptcy* ¶ 524.02[3][a] at pp. 524-28 to -29, text accompanying nn. 83-84. *See generally* Alan Pedlar, *Community Property and the Bankruptcy Reform Act of 1978,* 11 St. Mary's L.J. 349, 380-86 (1979) (discussing Section 524(a)(3) and (b)).

Rooz cites *Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc.*, 29 Cal.App.4th 1828, 35 Cal.Rptr.2d 348 (1994), in which a creditor was permitted to maintain a UFTA action against a corporation and its shareholders after the corporation's voluntary Chapter 7 bankruptcy. That case is entirely inapposite. Corporations do not have community property nor are they eligible to receive a discharge in Chapter 7. *See* 11 U.S.C. § 727(a)(1).

Rooz also cites *Sanwa Bank California v. Chang*, 87 Cal.App.4th 1314, 105 Cal.Rptr.2d 330 (2001), which held that a husband's discharge injunction did not protect his wife from a fraudulent transfer action to recover the family residence that he had conveyed to her before filing his bankruptcy petition. As that decision specifically notes, the house "was pre-bankruptcy property, not after-acquired property. . . ." *Id.*, 87 Cal.App.4th at 1319, 105 Cal.Rptr.2d at 333 (distinguishing *Strickland*, 153 B.R. 909). Therefore Section 524(a)(3) was inapplicable by its own terms. It only protects after-acquired community property.

At least one case has specifically applied Section 524(a)(3) to bar an action to garnish a non-debtor spouse's wages:

> Norwest [the creditor] seeks to execute against community property belonging to [Nellie and William] Lawver[ ] *in the form of Nellie's wages.* The language of 11 U.S.C. 524(a)(3) prohibits a creditor from seeking satisfaction of a community debt by resorting

> to the debtor's property through an action against the non-bankrupt spouse commenced after the filing of the petition in bankruptcy.

Norwest Financial v. Lawver, 109 Nev. 242, 246-47, 849 P.2d 324, 327 (1993) (emphasis added).

Bankruptcy courts have also recognized in dicta that the discharge injunction in Section 524(a)(3) protects community property wages. *See In re Passmore*, 156 B.R. 595, 598 (Bankr.E.D.Wis.1993) ("After Mr. Passmore's [the debtor's] discharge is issued, the discharge injunction will prevent creditors holding community claims from recovering *either* spouse's interest in funds classified as marital property, *such as Mrs. Passmore's wages*, even though she will not receive a discharge.") (italics in original, underlining added); *In re Nelson*, 308 B.R. 343 (Bankr.E.D.Wis.2004) (if wife had filed her Chapter 7 case prior to husband's Chapter 13 case, then her discharge injunction under Section 524(a)(3) would render community claims unenforceable against husband's subsequent wages).

For all of these reasons Rooz's claims are barred by the discharge injunction of Section 524(a)(3).

C. *David's motion*

The court assumes without deciding that David would also have standing to protect Roberta's alleged community property wages, earned prior to his own bankruptcy case, by seeking enforcement of Section

524(a)(3). But as the court observed at oral argument, David's motion to enforce that section appears to seek what the statute already provides automatically: an injunction. *See* 5 *Collier on Bankruptcy* ¶ 524.02[2] at p. 524-14.10 ("Like the automatic stay of section 362(a), the discharge injunction is the equivalent of a court order.") (footnote omitted). An injunction or declaratory relief regarding the scope of the discharge injunction would also require an adversary proceeding. *See* Fed. R. Bankr.P. 7001(9); *In re Munoz*, 287 B.R. 546, 551 (9th Cir. BAP 2002). For these reasons, David's combined motion to reopen and to enforce the discharge injunction will be denied without prejudice.

IV. *Conclusion*

Roberta is entitled to judgment on the pleadings. Rooz's UFTA claim against her is barred by the seven year statute of repose in California Civil Code section 3439.09(c). Rooz's UFTA claim is also barred by the discharge injunction of Section 524(a)(3). Rooz has suggested no amendment to his Complaint that would state a claim on which relief could be granted.

By separate orders the court will deny Rooz's oral motion for remand, grant Roberta's motion for judgment on the pleadings, dismiss this removed action with

prejudice, and deny without prejudice David's combined motion to reopen his case and enforce the discharge injunction.[11]

* END OF MEMORANDUM DECISION *

---

11. Any further proceedings by Rooz against either David or Roberta, however, will likely violate Section 524 and expose him to sanctions. *In re Zilog, Inc.*, 450 F.3d 996, 1007-10 (9th Cir.2006) ("A party who knowingly violates the discharge injunction [of Section 524] can be held in contempt under section 105(a) of the bankruptcy code.") (citations omitted).

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 19, 2008

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 08-60004

BAP No. NC-07-1152-DMkK
District of Alaska,
Anchorage

In re: ROBERTA KIMMEL,

Debtor,

WILLIAM B. ROOZ,

Appellant,

v.

ROBERTA KIMMEL,

Appellee.

Appendix D

ORDER

Before: BRUNETTI, ARCHER,* and CLIFTON, Circuit Judges.

Appellant's petition for rehearing is denied.

---

* The Honorable Glenn L. Archer, Jr., United States Circuit Judge for the Federal Circuit, sitting by designation.

APPENDIX E — RELEVANT STATUTES

11 U.S.C. § 105

§ 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest—

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

11 U.S.C. § 523

Sec. 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

* * *

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

* * * *

Appendix E

11 U.S.C. § 524

Sec. 524. Effect of discharge

(a) A discharge in a case under this title—

* * *

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if—

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

* * *

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

Appendix E

11 U.S.C. § 541

Sec. 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

* * * *

Appendix E

11 U.S.C. § 727

Sec. 727. Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

* * *

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

Appendix E

Cal. Civ. Code § 1214

Sec. 1214. Prior recording of subsequent conveyances, mortgages, judgments

Every conveyance of real property or an estate for years therein, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless the conveyance shall have been duly recorded prior to the record of notice of action.

Cal. Civ. Code § 3439.04

Sec. 3439.04. Transfers fraudulent as to present and future creditors; factors to determining intent

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor.

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:

Appendix E

(A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

(B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(b) In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following:

(1) Whether the transfer or obligation was to an insider.

(2) Whether the debtor retained possession or control of the property transferred after the transfer.

(3) Whether the transfer or obligation was disclosed or concealed.

(4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(5) Whether the transfer was of substantially all the debtor's assets.

(6) Whether the debtor absconded.

Appendix E

(7) Whether the debtor removed or concealed assets.

(8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.

(11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

(c) The amendment to this section made during the 2004 portion of the 2003-04 Regular Session of the Legislature, set forth in subdivision (b),, does not constitute a change in, but is declaratory of, existing law, and is not intended to affect any judicial decisions that have interpreted this chapter.

Appendix E

Cal. Civ. Code § 3439.07

§ 3439.07. Remedies of creditors

(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 3439.08, may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.

(2) An attachment or other provisional remedy against the asset transferred or its proceeds in accordance with the procedures described in Title 6.5 (commencing with Section 481.010) of Part 2 of the Code of Civil Procedure.

(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure, the following:

(A) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or its proceeds.

(B) Appointment of a receiver to take charge of the asset transferred or its proceeds.

(C) Any other relief the circumstances may require.

(b) If a creditor has commenced an action on a claim against the debtor, the creditor may attach the asset

transferred or its proceeds if the remedy of attachment is available in the action under applicable law and the property is subject to attachment in the hands of the transferee under applicable law.

(c) If a creditor has obtained a judgment on a claim against the debtor, the creditor may levy execution on the asset transferred or its proceeds.

(d) A creditor who is an assignee of a general assignment for the benefit of creditors, as defined in Section 493.010 of the Code of Civil Procedure, may exercise any and all of the rights and remedies specified in this section if they are available to any one or more creditors of the assignor who are beneficiaries of the assignment, and, in that event (1) only to the extent the rights or remedies are so available and (2) only for the benefit of those creditors whose rights are asserted by the assignee.

Appendix E

Cal. Fam. Code § 1502

§ 1502. Recording of agreements

(a) A premarital agreement or other marital property agreement that is executed and acknowledged or proved in the manner that a grant of real property is required to be executed and acknowledged or proved may be recorded in the office of the recorder of each county in which real property affected by the agreement is situated.

(b) Recording or nonrecording of a premarital agreement or other marital property agreement has the same effect as recording or nonrecording of a grant of real property.

APPENDIX F — COMPLAINT UPON TRANSFERS WITH INTENT TO DEFRAUD CREDITORS OR MAKING A TRANSFER WITHOUT FAIR CONSIDERATION FILED OCTOBER 4, 2006

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

No. CGC 06 456731

William Rooz

Plaintiff

v.

Roberta Kimmel, Doe 1,
Trustee of Trust,Does 2 to 10,

Defendants

Complaint Upon Transfers With Intent To Defraud Creditors Or Making A Transfer Without Obtaining Fair Consideration

(C.C. sec. 3439)

Appendix F

Plaintiff alleges:

AS AND FOR A FIRST CAUSE OF ACTION

1. Plaintiff is a resident of the County of San Mateo.

2. Defendant Roberta Kimmel is a resident of County of San Francisco, CA.

3. Plaintiff is ignorant of the true name of the defendant sued herein as Doe 1 and is alleged to be a Trustee for a Trust of which defendant is a beneficiary.

4. The true names and capacities, whether individual, associate or corporate of Does 2-10, inclusive, are unknown to plaintiff, who, therefore sues these defendants by such fictitious names. Does 2 to 10 are transferees of the properties which are, under law, subject to the satisfaction of the judgment of Mr. Rooz.

5. Plaintiff will seek leave to amend this Complaint when the true names and capacities of the Does are ascertained.

6. Plaintiff is informed and believes and thereon alleges that defendants, and each of them, were at all times herein the agents and employees of each of the other defendants and in doing the things herein alleged were acting within the proper scope and course of their agency and employments.

7. On or about May 30, 1995 Mr. Rooz obtained a judgment against Roberta Kimmel's husband, David Kimmel, in the County of San Mateo, Rooz v. Kimmel, No.368482. On or about September 27, 1997 the Judgment was amended. By May 30, 2006, the judgment in favor of plaintiff against Mr. Kimmel was approximately $1,081,500. Roberta Kimmel had been a defendant is said complaint, but the action against her was stayed upon her filing of a Petition in Bankruptcy in the Northern District of California,Bankruptcy Court, No. 93-33089. Said Petition was filed July 7, 1993.

8. Roberta Kimmel received a discharge in bankruptcy on March 15, 1994.

9. Execution had been issued on the judgment, with service upon David Kimmel, at various times. Plaintiff has heretofore received $1005.00 from the county based on earnings from Mr. Kimmel in October and November, 2005 and, except as stated above, the judgment is unpaid.

10. On or about July, 1995 Roberta Kimmel entered into a Postnuptial Agreement with David Kimmel in which she transferred properties including her future earnings into her separate property. Mr. Kimmel also made transfers under the agreement. Plaintiff is informed and believes and thereon alleges that said transfers were without fair consideration.

11. The above mentioned postnuptial agreement was made with an intention to prevent satisfaction of the judgment of Mr. Rooz.

12. David Kimmel petitioned for bankruptcy in gthe aforesaid court on October 16, 2006 under case no. 05-35269. He has been granted a discharge on February 13, 2005. This discharge is subject to an adversary proceeding filed by plaintiff. Said adversary proceeding is now on appeal.

13. None of the schedules filed in connection with the bankruptcy of Mr. David Kimmel listed any savings or checking accounts. The schedule I, current income of individual debtors, listed only the salary of David Kimmel.

14. Plaintiff is informed and believes, and on the basis of such information and belief, alleges Roberta Kimmel has been the manager of a corporation, Globus Enterprises, for many years last past; that said corporation is affiliated with defendant's father, Fred Baum, and that it has paid Roberta Kimmel a substantial salary; that during the years 2004 and 2005 she had been paid as salary at least $60,000 per year.

15. Plaintiff is informed and believes and thereon alleges that during the period May, 1995 to date Roberta Kimmel has earned substantial amounts; that she has deposited said salary payments into bank accounts. The ownership of the earnings and deposits of said sums have been, in truth and reality, under law, available to satisfy the judgment held by plaintiff.

16. Plaintiff is informed and believes and thereon alleges that Roberta Kimmel has had notice and

knowledge of the attempts of Mr. Rooz to bring about satisfaction of his judgment, that with such notice and knowledge she has, at least during the period July, 1995 to date, continued to place her funds into accounts as her separate property and that said transfers were made with an actual intent to defraud plaintiff. Plaintiff is informed and believes and thereon alleges that, under law, these salaries and funds, at least four years last past, and up to October 15, 2005, are subject to an accounting and an award to Mr.Rooz as the creditor of Mr. David Kimmel under the judgment of May 30, 1995.

AS AND FOR A SECOND CAUSE OF ACTION

17. Plaintiff repleads and realleges, as set forth in paragraphs 1 through 16 as though fully set forth herein.

18. Beginning in or about 1995, the exact date being unknown to plaintiff, defendants entered into a continuing conspiracy to deprive plaintiff of payments they were obligated to pay under the judgment held by plaintiff. Said conspiracy has been in operation at all times herein to and including this date.

WHEREFORE, plaintiff prays judgment against defendant Roberta Kimmel, and other defendants, as follows:

1. Defendants be required to account for and restore to plaintiff all of the properties obtained, transferred, concealed and disposed of by defendants which were otherwise available for the satisfaction of

the judgment of Mr. Rooz prior to the petition for bankruptcy of Mr. David Kimmel.

2. Defendants be restrained and enjoined during the pendency of this hearing from placing properties in accounts and holdings unknown to the court and plaintiff.

3. The court require the properties which are subject to the judgment of May, 1995, as amended, to be accounted for and be applied to the payment of plaintiff's judgment.

4. That plaintiff be allowed to inspect the books and records of defendants to ascertain the disposition of assets under the Postnuptial Agreement with David Kimmel dated on or bout July, 1995 up to and including the present.

Dated: September 29, 2006

Maxwell Keith
Attorney for William Rooz